No. 80-544

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The United States Chamber of Commerce submits this brief as *amicus curiae,* with the written consent of the parties pursuant to Rule 36.1, supporting the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the Nation; it has a direct membership of over 97,000 corporations, partnerships, proprietorships, and individuals, as well as over 4000 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents the interests of its members before the United States Congress, the Executive Branch, the federal regulatory agencies and, increasingly, the courts. Its appearances in litigation matters have included participation as *amicus curiae* in numerous cases before this Court.[1]

The Court of Appeals for the Second Circuit in this case has formulated a "presumption" that the decision to close a portion of a business, based upon economic considerations alone, is a mandatory subject of bargaining under the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 158(d) (1976). The case "stirs large issues" regarding the appropriate role of the collective bargaining representative in resolving fundamental business policy questions which lie "at the core of entrepreneurial control." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 217, 223 (1964) (Stewart, J., concurring).

For reasons sketched in the petition and in the dissent below, this *amicus* believes the decision of the Second Circuit is erroneous. Whether right or wrong, however, its conflict with decisions of other Circuits, and a broader contrariety of views in the lower federal courts even where there is no square conflict, beclouds a vital area of entrepreneurial functioning. This uncertainty, affecting numerous decisions of importance for the Nation's economy, presents a classic occasion for authoritative resolution by this Court.

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1 *E.g., Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, ___ U.S. ___, 100 S. Ct. 2844 (1980); *Consolidated Edison Co.* v. *Public Serv. Comm.*, ___ U.S. ___, 100 S. Ct. 2326 (1980); *New York Telephone Co.* v. *New York Dep't of Labor*, 440 U.S. 519 (1979).

ARGUMENT

THE QUESTION PRESENTED IS RECURRENT, IMPORTANT, AND SHROUDED IN THE UNCERTAINTIES OF CONFLICTING AND DIVERGENT LOWER COURT DECISIONS, CALLING FOR AUTHORITATIVE GUIDANCE BY THIS COURT

The petition for a writ of certiorari demonstrates a conflict between the decision below and decisions in other Circuits; a substantial measure of disagreement even between decisions that may not squarely and literally conflict; and substantial ground for urging that the decision here in question is wrong. Joining in those submissions without repeating them, the Chamber of Commerce stresses the profound significance of this subject for our economy and the high cost of confusion and unpredictability. Submitting that the court of appeals has erred in expanding the scope of mandatory bargaining, we would stress still more urgently the need for a rationale more intelligible than that court's "presumption" of bargainability coupled with an employer's burden of predicting whether the union's demand will be found some day to fulfill the purposes of the National Labor Relations Act. The Second Circuit's presumption diverges in this aspect from that of the Third Circuit, where the court recognizes a similar presumption and requires the employer to demonstrate that its economic interest in unilateral action outweighs its employees' stake in their jobs. *See Brockway Motor Trucks* v. *NLRB,* 582 F.2d 720, 735 (3d Cir. 1978). Both are effectively similar, however, in generating doubt

rather than giving light for a key area of managerial concern.[2]

1. A vital national economy requires a maximally free flow and effective use of its economic resources. If a healthy state of productivity is to be maintained, business managers must be able to proceed decisively when confronted with the necessity to terminate marginal or uneconomic operations. The need is especially acute in our time, when we are experiencing sharp declines either in the rate of increased productivity or, more alarmingly, in absolute productivity figures.[3]

The decision of the Court of Appeals for the Second Circuit in this case, creating an ill-defined, and therefore possibly irrefutable, "presumption" that an employer's partial closing of its business for economic reasons is a mandatory subject of collective bargaining, embodies a

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2 *See* Comment, *In a Partial Closing, The Interests of the Parties Must Be Balanced to Determine Whether the Closing Is a Mandatory Subject of Bargaining*, 47 GEO. WASH. L. REV. 679, 697-98 (1979).

3 Between 1976 and 1978, for example, the annual improvement in productivity in private nonfarm business slowed from 3.5% in 1976, to 1.3% in 1977, to .5% in 1978. In 1974, the same measure of productivity showed a 3.1% decrease from 1973. Between 1977 and 1978, productivity rates declined in such industries as corrugated boxes, footwear, hosiery, malt beverages, paper milling, and mining. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 413-14 (1979 ed.).

In the first three fiscal quarters of 1979, productivity rates declined in all nonfarm sectors of the economy with the exception of nondurable manufactured goods, which increased 8.7%. Productivity in the durable goods sector, which accounts for about 60% of all manufacturing employment, declined 0.2%. The 8.7% increase in productivity of nondurable goods was attributable in part to a drop in employment in this sector. Fulco, *Productivity Declines Continue Into Third Quarter 1979*, U.S. DEP'T OF LABOR, MONTHLY LABOR REVIEW 46 (February 1980).

rule that will hobble managerial flexibility in allocating both capital and labor. The decision constricts an area of choices "which lie at the core of entrepreneurial control." *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203, 223 (1964) (Stewart, J., concurring). It would transfer critical business judgments from the hands of those who have overall responsibility and a broad perspective to organizations which have a relatively narrow and exclusive concern with jobs under their jurisdiction. *See* Comment, *"Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency,* 14 U.C.L.A. L. REV. 1089, 1091 (1967); Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain,* 39 FORDHAM L. REV. 81 (1970). At a particularly inopportune time in our history, it would tend to rigidify processes in which crisp responsiveness and adaptability are prime requisites.

2. The deleterious impact upon business management appears to have been ordered by the Second Circuit, in this respect resembling the Third Circuit, without a full appreciation of its significance. A good deal more flows from the rule of decision than requiring " 'full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives. . . .' "[4] *See* to similar effect the Board's reference to the "minimal burden" of such required bargaining over partial closing decisions.[5]

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4 Opinion below, App. A to the petition for certiorari (hereinafter "App. A") at 8a, quoting from *Ozark Trailers, Inc.,* 161 N.L.R.B. 561, 568 (1966).

5 *Brockway Motor Trucks, Div. of Mack Trucks, Inc.,* 251 N.L.R.B. No. 23 (1980), *on remand from Brockway Motor Trucks* v. *NLRB,*

More is at stake than the delay involved in bargaining sessions, though this is likely in many cases to be destructive enough. For if the decision to close a portion of the business is a mandatory subject of bargaining, employees have a right, protected under Section 7 of the Act, to strike in support of their position. The use of such economic pressure "is part and parcel of the process of collective bargaining." *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 495 (1960). Armed with this weapon, a union perceiving no rational economic alternative to the partial closing decision is nonetheless free to seek coerced continuation of the operation both by striking the facility directly involved and by picketing or striking other installations of the same employer. The strike may "persuade" the employer to continue an uneconomic or marginally profitable activity, foregoing superior and more rational allocation of the affected resources, in order to avoid losses from economic pressure on its more profitable operations.

Consequences of this kind, if fairly compelled by what Congress wrote in the National Labor Relations Act, might call for legislative reconsideration of the statute in question. It bears remembering, however, that the course of decision on partial closings, as shown in the petition for certiorari (pp. 9-13), has been contrary to the ruling of which review is now sought. The Third and Second Circuits have arrived only in the last year or two at their differently defined "presumptions" of mandatory bargainability.[6] *See* pp. 7-9, *infra.* The conflict that has now

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supra, 582 F.2d 720 (3d Cir. 1978), *petition for review filed,* No. 80-2327 (3d Cir. Sept. 19, 1980).

6 The decision of the court below departs from the rationale of *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), where the

emerged is a matter of special moment in light of the substantial injuries threatened by the novel departures.

3. Beyond its seeming error as a matter of precedent, sound labor law policy, and statutory construction, the decision below gives concern because it remits the parties in bargaining relationships to clouded speculation as to their respective rights and duties. The court of appeals, holding there is a "presumption" that partial closing decisions are mandatorily bargainable, says the presumption "may be rebutted by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain" (App. A at 12a). In an effort to particularize that standard, the court goes on to opine that the rebuttal could be accomplished by showing "that bargaining over the decision would be futile" (*id.*), adding "[o]ther relevant considerations" and hypothetical circumstances that "might" defeat the presumption.[7]

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court held that an employer's decision to close one plant and transfer the work to another "was clearly within the realm of managerial discretion." *Id.* at 176. The court here indicated that the rationale of *Rapid Bindery* did not survive this Court's *Fibreboard* decision (App. A at 9a n.4). Similarly, Judge Rosenn, dissenting in *Brockway*, noted that the court's decision "departs from the principles of [the] court's landmark decision in *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965)," where the court had found no bargaining obligation with respect to a partial closing decision premised solely on economic reasons. 582 F.2d at 741.

7 "Other relevant considerations would be that the closing was due to emergency financial circumstances, or that the custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions. The presumption might also be rebutted if it could be demonstrated that forcing the employer to bargain would endanger the vitality of the entire business, so that the purposes of the statute would not be furthered by mandating bargaining to benefit some employees to the potential detriment of the remainder. This might be a particularly significant point if the number to be laid off

Reflecting upon these hypothetical possibilities, which depart from the Board's views as well as those of every other Circuit that has addressed the problem,[8] it seems obvious that the parties in a collective relationship are left to murky prediction in assessing whether it will some day be held that there was a duty to bargain. Guesses of this nature are to be made at the risk of large back-pay liabilities and potentially devastating injunctive relief in the process of implementing managerial judgments. A decision engendering such doubts on problems of such consequence calls at the least for authoritative revision and clarification.

The Second Circuit's departure from the Board's own rationale merits some special attention. The Board in this case followed, and urged upon the Circuit (App. A at 10a), what amounts to a "*per se* rule"—"imposing a duty to bargain whenever an employer closes part of its business. . . ."[9] There is not simply a presumption under the Board's view, and there are no speculative problems of potential rebuttals. Though it has the virtue

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was small and the number of the remainder was large" (App. A at 12a).

8 The Third Circuit's earlier decision finding a presumption of mandatory bargaining states a quite different, if not more sharply specific, test for rebuttal. It holds that the respective interests of employees and employers must be balanced in light of the facts of the particular case to determine if the bargaining presumption has been overcome, and says it will give some weight to the fact that, even though bargaining will as a practical matter be futile, the parties "[m]erely by sitting down together . . . may achieve important aims." *Brockway Motor Trucks, supra,* 582 F.2d at 737 n.92.

9 The fountainhead of the rule is *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966), followed by the Board in this case (App. A at 21a, 33a-34a). *See* petition for certiorari at 9.

of simplicity and intelligibility, that position has found approval in no Circuit. The point of special interest here is that the court of appeals, finding a need to reject the Board's reasoning while enforcing its result, was driven to the erroneous course of affirming "administrative action by substituting what it consider[ed] to be a more adequate or proper basis." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). That serves at a minimum to intensify the uncertainty governing a profoundly important subject of the national labor law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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